that his findings leading to that determination are like the pillars of the building. We cannot allow the pillars to be attacked, because if the pillars collapse the whole building will collapse also. Besides, the findings complained of were incorporated in the learned judge's determination certified to the Election Commission, they were part of his determination and no such part may be impugned in the Federal Court.

I would therefore dismiss this appeal with costs.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *Athinahappan & Co.; Joginder & Rajadurai.*

TAN AH SAM v. CHARTERED BANK

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) August 14, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 14 of 1970]

Banks & Banking — Cheque paid in for collection — Whether banker receiving cheque a holder in due course — Duty of bank — Whether words "refer to drawer" libellous — Bills of Exchange Ordinance, 1949, ss. 80 and 82C.

Defamation — Banker and customer — Whether words "refer to drawer" libellous.

The plaintiff was a fruit supply contractor. He opened a current account with the defendant bank on the November 7, 1968 and on November 8, 1968 he paid in a cheque for $1,306.71 drawn in favour of a partnership firm, of which the plaintiff was a partner. The cheque was subsequently returned by the bank to the plaintiff. In the meantime the plaintiff had issued several cheques which were dishonoured as there was no sufficient and available funds to meet them. These cheques were returned to the drawer with the note "refer to drawer". The plaintiff brought an action for damages against the defendant bank for wrongfully and in breach of their agreement dishonouring the cheques drawn by him; and further and in the alternative for falsely and maliciously writing on the cheques "refer to drawer" and publishing the same to the drawee.

Held by Abdul Hamid J. in the High Court: (1) the defendants received the cheque paid in as agents for collection and were not holders in due course of the cheque;

(2) in the circumstances of this case the defendants had good reasons to scrutinize carefully before deciding whether or not to accept the cheque and there was no evidence to show that they acted otherwise than in conformity with banking practice when they returned the cheque to the plaintiff;

(3) in this case there was no agreement express or implied that the plaintiff was permitted to draw before the cheque was cleared and when the plaintiff issued the cheques, there was clearly no sufficient and available funds to meet them and the defendants were justified in dishonouring them;

(4) on the evidence, the words "refer to drawer" by themselves were not libellous. The defendants were justified when compelled to dishonour the cheques to return them with a note to the drawee that he should refer to the drawer.

The appeal against the decision of Abdul Hamid J. was dismissed by the Federal Court.

Cases referred to:-

(1) *Underwood* v. *Bank of Liverpool* [1924] 1 K.B. 775, 804.

(2) *Re Farrows Bank Ltd.* [1923] 1 Ch. 41.

(3) *Westminister Bank Ltd.* v. *Zang* [1966] 1 All E.R. 114.

(4) *Bevan* v. *National Bank Ltd; Bevan* v. *Capital and Countries Bank Ltd.* 23 T.L.R. 65.

(5) *Ex parte the Darlington District Joint Stock Banking Co.* 45 E.R. 1044.

(6) *Flach* v. *London and South Western Bank* 31 T.L.R. 334.

The following cases were also cited in argument in the Federal Court: *Banbury* v. *Bank of Montreal* [1918] A.C. 626, 658, 661; *Yong Mok Hin* v. *United Malay States Sugar Industries Ltd.* [1967] 2 M.L.J. 9, 16, 17; *Siow Wong Fatt* v. *Sugar Rotan Mining Ltd. & Anor.* [1967] 2 M.L.J. 120, 121; *Nasib Singh* v. *Ramasamy* [1969] 1 M.L.J. 211; *Backhouse* v. *Charlton* [1878] 8 Ch. D. 444; *Chua Kim Liang* v. *Teo Kim Ngo* [1963] M.L.J. 261; *Lim Chui Lai* v. *Zeno Ltd.* [1964] M.L.J. 314, 315; *Blay* v. *Pollard* [1930] 1 K.B. 628, 634; *L.P.T.B.* v. *Moscrop* [1942] A.C. 332, 347, H.L.; *Qualcast* v. *Haynes* [1959] 2 All E.R. 38, 44D, 44E, H.L.; *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218, 241, 243, 239; *Akrokerri Mines Ltd.* v. *Economic Bank* [1904] 2 K.B. 465, 468, 470; *London Joint Stock Bank* v. *Simmons* [1892] A.C. 201, 221; *In re Riches* (1865) 46 E.R. 1044.

FEDERAL COURT.

M. Abraham for the appellant.

P. J. Mooney for the respondent.

In the High Court *Kok Wee Kiat* appeared for the plaintiff and *Alex Lee* for the defendants. On February 23, 1970 the following judgment was delivered:

Abdul Hamid J.: The plaintiff, a businessman, is claiming damages against the defendants for wrongfully and in breach of their agreement dishonouring certain cheques drawn by him; further and in the alternative the plaintiff is alleging that the defendants falsely and maliciously wrote on the aforesaid cheques of and concerning the plaintiffs "refer to drawer" and published the same to the drawee.

The defendants are bankers carrying on business at Kuala Lumpur.

The plaintiff is a fruit supply contractor of the officers' mess of the Federation Army. He also deals with fish, vegetables and other provision. On November 7, 1968, he opened a current account with the defendant bank at Kuala Lumpur. On November 8, 1968, he paid in a cheque for $1,306.71, drawn in favour of Robert Brothers Trading, a company in which the plaintiff is one of the two partners. It was a crossed cheque and the words "or bearer" had not been crossed out. The cheque was endorsed by his brother and chopped with the partnership chop.

On November 11, 1968, the plaintiff issued 6 cheques, 3 of which were cheque Nos. PA 510204 (P. 3), PA 510208 (P. 4), and PA 510209 (P. 5). These cheques were dishonoured as there was no sufficient and available fund to meet them. These cheques were returned to drawee with a note "refer to drawer."

On November 13, 1968, the plaintiff went to defendant bank to pay in some money. While he was there, a member of the staff told him that his account would be closed. The plaintiff showed the paying-in slip for the sum of $1,306.71 (P. 1B). After some time this man produced the cheque and showed it to him. He was, however, told that the cheque could not be used and it would be returned to him by post. On November 15, 1968, he received P. 2 by post together with a covering letter (P. 11). On receipt of P. 2, he

re-presented it and this time the sum was credited to his account.

The plaintiff alleges that as a result of the dishonour of 6 cheques (only three were produced by him) his business was affected. Businessmen with whom he dealt with had no more faith in his cheques. They refused to give him credit.

The defendants deny that they acted wrongfully and in breach of their duty. They also deny that, in publishing the words "refer to drawer", they did so falsely or maliciously and that those words bear the meaning alleged or any defamatory meaning. The defendants contend that the cheques were dishonoured as the plaintiff had no sufficient fund to meet them. The defendants also contend that the plaintiff on numerous occasions issued cheques which the defendants were compelled to dishonour as there were no or no sufficient funds in the plaintiff's account to meet the said cheques.

Mr. Kok Wee Kiat, counsel for the plaintiff, submits that there are two issues to be decided —

(1) whether at the time of dishonour, there was sufficient funds, and

(2) whether there was libel in publishing "refer to drawer".

On the first issue, Mr. Kok submits that the court has to consider —

(a) whether the bank was justified in refusing to collect payment, and

(b) assuming that they were so justified in refusing to collect, whether the bank committed breach to the plaintiff as customer.

As regards (a), counsel refers to *2 Halsbury's* Laws of England, 3rd edition, p.76 on the duties of a collecting banker. He submits that the character in which a banker receives the cheque (P. 2) is a matter of fact in each case.

First of all, I propose to consider the character of the defendant bank. In this case it seems clear that in respect of P. 2 the plaintiff was a holder in due course but when it was paid in, were the defendants holders in due course? Mr. Alex Lee, counsel for the defendants argues that they were not. He cited the case of *Underwood* v. *Bank of Liverpool*,[1] where it was held that the bank in that case was not —

"holders in due course there being no evidence that they took the cheques for value. The mere fact that bankers credit a customer with the amounts of cheques before they are cleared does not make them holders for value. In order to entitle them to that character there must have been an agreement, express or implied, that the customer should be allowed to draw against the cheques before clearance, and that agreement must have been acted upon."

In *Re Farrows Bank Ltd.*,[2] it was held that —

"where a customer pays a crossed cheque into his bank, the question whether the bank receives it as holders for value or as agent for collection is a pure question of fact."

"The fact that a cheque is immediately credited in the ledger does not necessarily make the bank holders for value. That inference may be rebutted by notices in the pass-book and paying-in slip or other evidence showing that the customer could not draw before clearance."

[See *Westminister Bank Ltd.* v. *Zang*[3]; *Paget's* Law of Banking, 7th edn. p. 288; also 2 *Halsbury's* Laws of England 3rd edn. p. 185 paragraphs 350 and note (k)].

On the evidence before me and after considering the above authorities, I am unable to hold that the defendants were holders in due course in respect of P. 2 even though a paying-in slip (P. 1B) was issued. It is a fact that the amount in P. 2 was not credited to the plaintiff's account and it is also a fact that there was no contract, express or implied, between the plaintiff and the defendants that the plaintiff would be entitled to draw against the amount before it is cleared. The paying-in slip expressly stated that the counterfoil was only valid when overprinted by the bank's Telex machine and the amount printed is for credit to account after the cheque had been verified by the bank's officers.

Mr. Kok also submits that a banker who fails to present a cheque after it reaches him is liable to the customer for loss arising from delay. In the first place, this issue is not, in my opinion, pleaded by the plaintiff. The question that arises in the instant case, I think, is not the delay in presenting. If at all there may be a question of breach of statutory duty resulting from a delay in returning the cheque to the plaintiff. Again I think this is not pleaded by the plaintiff. The breach of statutory duty that was pleaded by the plaintiff was in respect of failure on the part of the defendants to honour the cheques drawn by him.

On the question whether the defendants were justified in refusing to collect payment, Mr. Kok argues that since P. 2 was a bearer cheque and the plaintiff was a holder in due course, the sum ought to have been credited to his account. While it is true that the cheque was a bearer cheque and that the plaintiff was a holder in due course, it is equally plain that the cheque was drawn in favour of a company and that such cheque was required to be credited to a personal account.

What were the duties of the bank under such circumstances? The defendants as a collecting bank, were faced with the peculiar difficulty of having a divided duty towards the true owner and their own customer. To afford themselves protection under the law, they must act in good faith and without negligence. Sections 80 and 82C of the Bills of Exchange Ordinance, 1949 impose a statutory duty that banks must act in good faith and without negligence. Mr. Lee submits that in dealing with a customer, who is also a partner, who puts in a cheque drawn in favour of the partnership into his own private account, the bank must fulfil that statutory duty. He cited *Bevan* v. *The National Bank Ltd. — Bevan* v. *The Capital and Counties Bank Ltd.*[4] and *ex parte The Darlington District Joint Stock Banking Company.*[5] He also quoted passages from *Paget's* Law of Banking, 7th edn. p. 386/7; *Sheldon's* Practice in Law of Banking, p. 2557; and *Tenan's* Banking Law and Practice of India, p. 155.

I do not propose to reproduce the passages referred to. In my opinion, it is abundantly clear from these authorities that —

"Apart from a procuration signature, any indication that the customer is using for his own benefit a document *prima facie* created for the benefit of, and being the property of, another person with whom he stands in fiduciary relationship should put the banker on enquiry. Under this head would come ...

cheques payable to a partnership and endorsed by one partner paying in to his private account." [*Halsbury's* Laws of England, Vol. 2, 3rd edition, p. 182 paragraph 345.].

In the same volume at p. 180 paragraph 343, the learned author, under the heading of "Acting in good faith and without negligence" says —

"The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiry. The banker is bound to make inquiry when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account."

In the instant case, the plaintiff paid in into his own private account a partnership cheque purported to be endorsed by some one presumably his partner, and he did so on the day after he opened the account. The defendants, I think, had good reasons to scrutinize carefully before deciding whether or not to accept, particularly when there was some history attached to Robert Brothers Trading Company. This company, it is revealed, operated an account sometime in 1967 and it was closed, as admitted by the plaintiff, after 1½ months because of the unsatisfactory manner in which it was operated.

Mr. Kok further argues that the defendants ought to have proceeded to make inquiries. Mr. Balasingam (D.W. 3) ought to have looked into the account of Robert Brothers Trading Company. What good would that do? D.W. 3 was in fact fully aware of the circumstances relating to the account of Robert Brothers Trading Company. He had full knowledge of the unsatisfactory manner in which the account was operated.

D.W. 5, a bank assistant of Hongkong and Shanghai Bank, Associate of Institute of Bankers, England, said that he studied banking practice and is conversant with both theory and practice. He gave expert evidence that —

"If a person paying in P.2 were a partner of the partnership in favour of whom cheque is drawn, the bank is put on an enquiry. If the person who paid in could not be contacted he would be informed by post and returned the cheque."

On the evidence before me, there is nothing to suggest that the defendants acted otherwise than in conformity with banking practice when they returned the cheque to the plaintiff. It was a valid and proper course for the defendants to take and in doing so, I think, they acted in good faith.

Mr. Kok also submits that even if the defendants were justified in refusing to accept P. 2, the question arises whether the defendants committed a breach to the plaintiff as customer. He argues that the plaintiff was confident that the cheque would be cleared and was entitled to presume that the cheque would be paid into his account and was at liberty to draw cheques. To my mind the question no longer arises. The law, I think, is clear. The plaintiff is not entitled to assume that the cheque he paid in would be cleared. It is settled law that a banker's duty is based on the contractual relationship of creditor and debtor. One of the conditions to be satisfied before payment is that funds must be sufficient and available unless there has been an agreement, express or implied otherwise entered into between the creditor and the banker, that the creditor shall be allowed to draw on the cheque the moment he paid it in.

"The relationship between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques when the account is in credit." [*Paget's* Law of Banking 7th edition, p. 269].

It is also settled law that —

"The funds must not only be sufficient, but available. Even in the case of notes or gold, the banker is entitled to reasonable time between the paying in and drawing against which to carry out the necessary book-keeping entries. In the case of cheques and other documents, he is entitled to a reasonable time for clearing or collection according to their respective nature."

"Mere crediting as cash is not sufficient to entitle the customer to draw the cheque before clearing. There must be an agreement, express or implied, to permit the customer to draw." [2 *Halsbury's* Laws of England, 3rd edition, p. 194 paragraph 362].

In the present case, there was no agreement, express or implied, that plaintiff was permitted to draw before the cheque is cleared. When the plaintiff issued the cheques, there was clearly no sufficient and available funds to meet them.

As regards the allegation that the words "Refer to drawer" published by the defendants were libellous, Mr. Lee cited the case of *Flach* v. *London and South Western Bank (Limited*[6]) — and also referred to *Paget's* Law of Banking p. 293. On the evidence before me, I am unable to find that these words alone were libellous. The defendants were, I think, justified when compelled to dishonour the cheques, to return them with a note to the drawee that he should refer to the drawer.

For these reasons I dismiss the claim with costs.

From the above dismissal the plaintiff appealed to The Federal Court.

Suffian F.J. (read by Gill F.J.): The plaintiff (appellant here) is a contractor supplying fruit to the Officers' Mess of the Federation Army. On 7th November, 1968, on the recommendation of Lt.-Col. Dorairaju, he opened a current account with the defendant Chartered Bank (respondent here) by depositing cash $300. On the following day he paid in a cheque (Exhibit P2) for $1,306.71. This cheque was drawn in favour of Robert Brothers Trading, a firm in which he and his younger brother were partners. The cheque had been endorsed by his brother and stamped with the partnership chop. When he paid in the cheque, the plaintiff was given the usual pay-in slip.

The plaintiff thus thought that he had $1,606.71 in his account.

On 9th November, which was a Saturday, he issued six cheques for a total amount of $953.40. When these cheques were presented during the following week by the respective holders, they were dishonoured and returned each with a note "refer to drawer".

On 13th November, which was a Wednesday, the plaintiff went to the defendant bank to pay in some money. There a member of the bank staff told him that his account would be closed, whereupon the plaintiff showed him the pay-in slip for the cheque he had paid in. After some time the bank employee produced

the cheque (Exhibit P2) and showed it to the plaintiff and told him that the cheque could not be used and would be returned to him by post. On 15th November the plaintiff received the cheque by post under cover of a letter from the bank in the following terms:

"We return herewith the above cheque which was paid into your account on 8th November, 1968, as it is drawn in favour of Robert Brothers Trading Company.

We would advise that it is a normal practice of banks to refuse to collect cheques drawn in this manner and would suggest that you request the drawer to issue the cheque in your favour as payee."

On the same day he redeposited the cheque with the bank and this time (for the first time) the amount was credited to his account.

The plaintiff alleges in his statement of claim two things:

(a) in dishonouring the cheques when there were sufficient funds in his account to meet them, the bank acted wrongfully and in breach of their duty and caused him damages;

(b) further or in the alternative, the bank falsely and maliciously returned the cheques to the holders with the words "refer to drawer" — by those words the bank meant and was understood to mean that the plaintiff did not have sufficient money in his account to meet the cheques and that he was a person whose financial standing was unsound, to whom credit should not be given and with whom no one should have business dealings.

The bank denies everything. It says that the cheques were dishonoured as the plaintiff did not have sufficient funds to meet them. It also says that the plaintiff on numerous occasions had issued cheques which it was compelled to dishonour as there was no or insufficient money in his account to meet them.

In the lower court Mr. Kok, the plaintiff's counsel, submitted that there were two issues to be decided:

(1) whether at the time of dishonour there was sufficient funds in the plaintiff's account; and

(2) whether the bank had libelled the plaintiff when it sent the note "refer to drawer" to the holders of the respective cheques.

The learned trial judge dismissed the plaintiff's claim.

I am of the opinion that the learned judge was right and that the plaintiff's appeal should be dismissed.

When the cheque P2 was first paid in on 8th November, its amount was not credited forthwith to the plaintiff's account, and so when the six cheques issued by the plaintiff were presented by their respective holders there was insufficient money in the plaintiff's account to meet them. I agree with the learned judge that the bank did no wrong in not immediately crediting the cheque to the plaintiff's account. There was evidence that it is bank practice that when a partnership cheque is paid into a personal account a bank is put on enquiry and that the person into whose personal account the cheque is paid would be informed by post and the cheque returned to him.

When the plaintiff first opened his account there was no enquiry made by the bank. I think that the bank acted quite reasonably because the plaintiff had been introduced by a senior officer of the armed forces. The bank also acted reasonably when it did not immediately credit the amount of the cheque to the plaintiff's account, because soon after the opening of this account a bank official realised that the partnership of which the plaintiff was a partner previously had an account with the bank, which account had been operated so unsatisfactorily that within one and a half months the bank had to close it.

In any event, even if the amount of the cheque had been credited immediately to the plaintiff's account the plaintiff did not have the right to draw against it until the cheque had been cleared, as was clearly stated in the pay-in slip which contained the words that the amount deposited "is for the credit of your account *after* the cheques have been verified by the bank's officers".

Mr. Abraham for the plaintiff before us complains that the bank was negligent in delaying to inform the plaintiff of what it had done. There was evidence that the letter received by the plaintiff on the 15th had been typed on the 9th, which implies that even as early as the 9th the bank had decided to return the plaintiff's cheque and yet they did not post it until the 13th, and, it is said, that if the bank had not been negligent and had posted the letter on the 9th, the day it was typed, it would have reached the plaintiff on the 11th (a Monday) and he would have made other arrangements to put his account in funds in time to meet the cheques he had issued. I think that this argument raises a new issue and we should not consider it. The pleadings do not mention negligence, there was naturally no evidence led by the bank to rebut it and there was no mention of it in Mr. Kok's address in the lower court.

I do not think that the plaintiff was a good client. Apart from admitting that he and his partners had operated the old partnership account unsatisfactorily, he admitted that he operated his own personal account also unsatisfactorily. He admitted that on 4th December, 1968, when his credit balance was $194.77 he issued a cheque for $1,061.88; that on 7th December when his credit balance was $23.39 he issued four cheques totalling $562.85; and that on 14th and 15th December when his credit balance was $205.54 he issued five cheques totalling $1,305.20. So his conduct subsequent to the closure of his partnership account and subsequent to the issue of the six cheques in question here, also shows that his banker has good reason to be put on enquiry.

Mr. Abraham tries to make the point that it was unreasonable of the bank to refuse to credit the amount of the cheque P2 to the plaintiff's account on the first occasion when they did not hesitate to do so when it was paid in on the second occasion, namely, on the 13th, without any further enquiry. I do not think that there is any merit in this point, as it is within the bank's discretion to credit or not to credit it on the second occasion.

I would therefore dismiss this appeal with costs.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *M. Abraham; Skrine & Co.*